APPEALS – State's direct appeals under A.R.S. § 13-4032, in general
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A.R.S. § 13-4032 governs the State's right to appeal. That statute allows the State to appeal from any of the following:

> 1. An order dismissing an indictment, information or complaint or count of an indictment, information or complaint.
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> 2. An order granting a new trial.
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> 3. A ruling on a question of law adverse to the state when the defendant was convicted and appeals from the judgment.
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> 4. An order made after judgment affecting the substantial rights of the state or a victim, except that the state shall only take an appeal on an order affecting the substantial rights of a victim at the victim's request.
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> 5. A sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A.
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> 6. An order granting a motion to suppress the use of evidence.
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> 7. A judgment of acquittal of one or more offenses charged in an indictment, information or complaint or count of an indictment, information or complaint that is entered after a verdict of guilty on the offense or offenses.

The Arizona Constitution gives every criminal defendant a right to appeal.[1] *State v. Smith*, 184 Ariz. 456, 459, 910 P.2d 1, 4 (1996). By contrast, the State's right to appeal is strictly statutory and is limited by the scope of the statute. *State v. Valdez*, 48 Ariz. 145**,** 150, 59 P.2d 328, 331 (1936); *State v. Berry*, 133 Ariz. 264, 267, 650 P.2d 1246, 1249 (App. 1982). The only permissible appeals by the State in criminal cases

[1] Article 2, § 24 of the Arizona Constitution provides in part: "In criminal prosecutions, the accused shall have . . . the right to appeal in all cases."

are the appeals specified in A.R.S. § 13-4032.[2] *State v. Fayle*, 114 Ariz. 219, 560 P.2d 403 (1976), *adopting State v. Lopez*, 26 Ariz.App. 559, 560, 550 P.2d 113, 114 (1976). Thus, for example, the State may not appeal when the trial court has set aside a guilty plea and dismissed the case with prejudice. *State ex rel. Ronan v. Stevens*, 93 Ariz. 375**,** 380, 381 P.2d 100**,** 104 (1963). However, if the defendant files a direct appeal, the State may cross-appeal on issues on which the State could not have filed a direct appeal under any of the subsections of A.R.S. § 13-4032. *State v. Webb*, 149 Ariz. 158, 166-67, 717 P.2d 463, 470-71 (App. 1985).

Rule 31.3, Ariz. R. Crim. P., provides that "The notice of appeal shall be filed with the clerk of the trial court within 20 days after the entry of judgment and sentence." This 20-day time limit is jurisdictional, meaning that if the State does not file a notice of appeal within that 20-day period, the Court of Appeals has no power to consider the appeal. *State v. Dawson,* 164 Ariz. 278, 280, 792 P.2d 741, 743 (1990); *State v. Smith*, 171 Ariz. 501, 503, 831 P.2d 877, 879 (App. 1992); *but see* Ariz. R. Crim. P. 31.3(a) (state has 20 days to file notice of cross-appeal, after service of appellant's notice of appeal).

The defense is sometimes allowed to file delayed appeals (Ariz. R. Crim. P. 32.1), but the State can never file a delayed appeal. "The procedural vehicle for 'delayed' criminal appeals is available only to defendants, not to the state." *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 78, 796 P.2d 876, 880 (1990). Also note that filing a

[2] If the State wishes to seek appellate court relief from anything other than an appealable order under A.R.S. § 13-4032, the State must do so by filing a petition for special action under the Rules of Procedure for Special Actions. However, note that appellate review is mandatory, while special action review is discretionary. That is, the Court of Appeals **must** consider and rule on the merits of a properly-filed direct appeal, but that Court has discretion to deny special action review without considering the merits.

motion for reconsideration **does not** toll or extend the 20-day limit for filing a notice of appeal. *State ex rel. Neely v. Rodriguez*, *id*.

Failure to object at trial ordinarily waives an issue on appeal absent fundamental error. *State v. Hughes*, 193 Ariz. 72, 85, 969 P.2d 1184, 1197 (1998); *State v. Gallegos*, 178 Ariz. 1, 11, 870 P.2d 1097, 1107 (1994). But the State does not need to object to a judgment of dismissal to preserve its right to appeal. *State v. Rasch*, 188 Ariz. 309, 311, 935 P.2d 887, 889 (App. 1996). Nor does the State need to object to an illegal sentence to preserve its right to appeal. *State v. Holguin*, 177 Ariz. 589, 591, 870 P.2d 407, 409 (App. 1993).

Interlocutory appeals – that is, appeals that are taken during the pendency of a criminal proceeding, before any final order is entered -- are not permitted in criminal cases. Therefore, the State may not appeal when the trial court rejects a plea agreement, because such an order does not conclude the case. In *State ex rel. Bowers v. Superior Court*, 173 Ariz. 34, 839 P.2d 454 (App. 1992), the trial court rejected a proposed plea agreement because the court disagreed with the stipulated sentence. The trial court also denied the State's motion to allege prior convictions under *State v. Hannah*, 126 Ariz. 575, 617 P.2d 527 (1980) (superseded on other grounds by statute, acknowledged in *State v. Thompson*, 198 Ariz. 142, 144-145, 7 P.3d 151, 153-154 (App. 2000)). The defendant filed a motion for reconsideration; the trial court denied it. The State then sought special action review of both issues. The Court of Appeals found that the State has no right to a direct appeal from a trial court's order rejecting a plea agreement. The Court recognized that the State could appeal an illegal sentence if, after a conviction, the trial court refused to impose an enhanced sentence based on

prior convictions. Further, if the defendant appealed after conviction, the State could cross-appeal the trial court's refusal to consider the prior convictions. Nevertheless, the Court of Appeals found that the State properly raised these issues by special action. The Court of Appeals reasoned that the State was the appropriate party to bring the special action, even though the trial court had denied the defendant's motion to reconsider, "because the State has an interest in reinstating a plea agreement to which it is a party in an effort to protect its resources and enhance judicial economy. *Id*. at 38, 839 P.2d at 458.

The Court of Appeals has further clarified the definition of "illegal" sentences for the purpose of a state's appeal, pursuant to A.R.S. §13-4032(5). In *State v. Viramontes*, the Court stated that A.R.S. § 13-4032(5) refers only to sentences that are "outside the statutory range". *State v. Viramontes*, 208 Ariz. 336, 338, 93 P.3d 536, 538 (App. 2004). Thus, a sentence may be imposed by an unlawful sentencing process and still would not be an "illegal" sentence unless it was also outside the statutory range. *Id*.

When the trial court enters an appealable order against the State (by, for example, granting the defense's motion to suppress evidence), the State may move to dismiss the case without prejudice pending resolution of the appeal. Later, if the Court of Appeals decides the issue in the State's favor, the State may refile the charges. *Litak v. Scott*, 138 Ariz. 599, 601, 676 P.2d 631, 633 (1984); *see also State v. Transon*, 186 Ariz. 482, 484, 924 P.2d 486, 488 (App. 1996); *State v. Hill,* 136 Ariz. 347, 348, 666 P.2d 92, 93 (App. 1983). The State should ordinarily dismiss the charges pending a State's appeal in order to preserve a defendant's speedy trial rights and not postpone

the case indefinitely. *State v. Million*, 120 Ariz. 10, 14, 583 P.2d 897, 901 (1978); *State v. Lelevier*, 116 Ariz. 37, 38-39, 567 P.2d 783, 784-85 (1977).

The State may appeal an "order granting a motion to suppress the use of evidence". A.R.S. § 13-4032(6). The term "motion to suppress" is interpreted strictly and includes only motions that challenge "only *the constitutionality of the obtaining of evidence by the state* and [are] made before trial begins". *State v. Bejerano*, 219 Ariz. 518, 520, 200 P.3d 1015, 1017 (App. 2008), *quoting State v. Levelier,* 116 Ariz. 37, 38, 567 P.2d 783, 784 (1977). Thus, the preclusion of a witness as a result of a failure to disclose is not appealable. *Id*.

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